UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

APR 26 2016

Dear Colleague:

I write today regarding the responsibilities of States, school districts, and other public agencies in addressing the special educational needs of children with disabilities who reside in nursing homes. Although their numbers are small,[1] their medically complex conditions present unique challenges. In addition, because these children live away from their families, and may enter nursing homes from a hospital or through a child welfare or health agency, they may not always be known to responsible educational authorities or be receiving appropriate educational services. States are required under Part B of the Individuals with Disabilities Education Act (IDEA or Part B) to make available to all children with disabilities a free appropriate public education[2] (FAPE), which emphasizes special education and related services that, among other things, are designed to meet the unique needs of each child, including those children residing in nursing homes. In 2014, the U.S. Government Accountability Office (GAO) highlighted some of the unique educational challenges that may arise in serving this unique population in its report, *Special Education: Additional Federal Actions Could Help Address Unique Challenges of Educating Children in Nursing Homes* (GAO 14-585).[3] Based on the observations and findings made by GAO in this report, the Office of Special Education and Rehabilitative Services (OSERS) recognizes that there is a need for further guidance to ensure that children with disabilities who reside in nursing homes are evaluated in a timely manner and receive appropriate special education and related services. Accordingly, OSERS is issuing this letter to clarify that children with disabilities residing in nursing homes and their parents have the same rights under IDEA that apply to all other IDEA-eligible children, and to highlight some of the IDEA requirements that are especially relevant to the needs of this unique population. This letter will also identify best practices to assist States and their public agencies in meeting the unique educational needs of these children.

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[1] According to the Department of Health and Human Services (HHS), children represented less than a half a percent (0.2 percent) of the more than 1.4 million nursing home residents in the United States as of December 31, 2011. *See*: HHS's Centers for Medicare & Medicaid Services' *Nursing Home Data Compendium*, 2013 available at: https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium_508.pdf.

[2] Under Part B of IDEA, a child's entitlement to FAPE begins at the child's third birthday and could last to the 22nd birthday, depending on State law or practice. 34 CFR §300.102.

[3] This report is available at: http://www.gao.gov/products/GAO-14-585. Among other things, GAO found that the child find requirement under IDEA and the responsibility for providing special education services was divided generally evenly among the States between the school district where the child's family resides and the school district where the nursing home is located. Additionally, GAO found that a child's medical fragility affected the amount of instructional time they received.

Child Find and Evaluations

Under IDEA and its implementing regulations, each State and its local educational agencies (LEAs) must have in effect policies and procedures to ensure that all children with disabilities residing in the State who need special education and related services, regardless of the severity of their disability, are identified, located, and evaluated. 34 CFR §§300.111 and 300.201. This requirement, known as child find, applies to all children suspected of having disabilities under IDEA, including those who have complex medical needs and who reside in nursing homes because of serious health problems. The IDEA child find requirements permit referrals from any source, including nursing home staff, who suspects a child may be eligible for special education and related services. In general, if a public agency suspects that a child in a nursing home has a disability and needs special education and related services, an initial evaluation that meets the requirements in 34 CFR §§300.304-300.311 must be conducted within 60 days of receiving parental[4] consent for the evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. 34 CFR §300.301(c)(1).[5] Among other requirements, the evaluation must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. This information may assist in determining whether the child is a child with a disability, as defined in 34 CFR §300.8, and the content of the child's individualized education program (IEP). 34 CFR §300.304(b)(1); see also 34 CFR §300.304(c)(4) (assessing the child in all areas related to the suspected disability, as appropriate).

Additionally, in interpreting evaluation data for the purpose of determining if a child is a child with a disability and the child's educational needs, the public agency must draw upon information from a variety of sources, including parent input, as well as information about the child's physical condition. 34 CFR §300.306(c)(1). Therefore, a parent may choose to share with the public agency an evaluation conducted by nursing home staff or other medical professionals about the child's health and physical condition.

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[4] As defined in 34 CFR §300.30, parent means a biological or adoptive parent of a child; a foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent; a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State); an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or a surrogate parent who has been appointed in accordance with 34 CFR §300.519 or section 639(a)(5) of IDEA.

[5] The evaluation timeframe does not apply if a child is moved to a nursing home in a new school district after the relevant timeframe has begun and prior to a determination by the child's previous public agency or school district whether the child is a child with a disability under Part B. 34 CFR §300.301(d). In this situation, the new public agency or school district may extend the 60-day or State-established timeframe only if: (1) it is making sufficient progress to ensure prompt completion of the evaluation; and (2) the parent and the new public agency agree to a specific time when the evaluation will be completed. 34 CFR §300.301(e).

State Responsible for Child Find

Under Part B of IDEA, the State where the child's parents reside is responsible for conducting child find, including individual evaluations, and ensuring that FAPE is provided to an eligible child. Generally, States assign this responsibility to the school district where the child's parents reside.[6] If the nursing home is located in the State where the child's parents reside, but is within another school district within the same State, the State would need to determine whether it would be appropriate for the school district of the parents' residence to conduct child find; or the State could assign that responsibility to the school district where the nursing home is located, if the school district where the child's parents reside has not yet conducted or completed the evaluation. There also could be situations where the nursing home in which the child resides is located in a State that is different from the State of the parent's residence. In these circumstances, the Department's long-standing position is that it is residence that creates the duty under the statute and regulations to make FAPE available, not the location of the child or school. Accordingly, if a child is placed or referred outside the State by an educational or non-educational State or local agency, such as a child welfare, social service, or other similar State agency, whether for educational or treatment reasons, the State initiating the placement or referral (i.e., the "placing State") is responsible for ensuring that the child receives FAPE.[7] This responsibility would include conducting child find. Therefore, the State where the nursing home is located would need to coordinate with the placing State once the child is identified to determine how the evaluation will be conducted. The placing State could either contract with the school district where the nursing home is located to conduct the evaluation, or ensure that the evaluation is conducted through some other arrangement.

When considering best practices related to child find, it is important to note that nothing in IDEA requires that an evaluation of a child suspected of having a disability take place in a school setting. If the child's suspected disability involves a medical condition which would make it difficult for the child to take certain tests or complete parts of the evaluation in a school setting, the evaluator may work with the child's parents and doctors to determine what would be an appropriate setting to conduct the evaluation. In general, the public agency may not refuse to conduct the evaluation because the child is unable to come to a school setting for the evaluation.[8]

Provision of Special Education and Related Services

After a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child within 30 days of the eligibility determination.

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[6] Office of Special Education Programs (OSEP) Letter to Biondi, Oct. 7, 1997.

[7] *See* OSEP letter to McAllister, June 9, 1994. OSEP explained in response to a subsequent inquiry that this letter does not apply if the child's parents move to another State. See OSEP letter to Moody, Oct. 24, 1995; see also 34 CFR §300.323(f).

[8] IDEA also includes requirements for periodic reevaluations in accordance with 34 CFR §§300.304-300.311. See 34 CFR §300.303.

34 CFR §300.323(c)(1).[9] As stated above, under Part B of IDEA, the school district in the placing State where the parent resides is responsible for ensuring that FAPE is provided to the child if the nursing home is located in a school district in a different State; however, the placing State could arrange for the school district where the nursing home is located to be responsible for the provision of special education and related services to the child. Even if this were to occur, we emphasize that the placing State retains ultimate responsibility for ensuring the provision of FAPE to its resident children with disabilities whom the State places or refers to nursing homes located in another State. 34 CFR §300.149.

Under IDEA, in order to make FAPE available to each eligible child with a disability, the responsible public agency must ensure that an appropriate IEP is developed and implemented for the child. The child's IEP must be designed to enable the child to be involved in and make progress in the general education curriculum. 34 CFR §300.320(a)(1), (2) and (4). As is true for other children with disabilities, the IEP is developed at a meeting of the IEP Team which includes the child's parents and relevant school officials, and whenever appropriate, the child. 34 CFR §300.321(a). Also, the IEP Team could include, at the discretion of the parent or the public agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate. 34 CFR §300.321(a)(6). Thus, there are situations where nursing home personnel involved in the care of the child could be members of the child's IEP Team, provided the party (public agency or parents) who invited the individual to be a member of the IEP Team can demonstrate that the individual possesses the requisite knowledge or special expertise regarding the child. 34 CFR §300.321(c)

Once a proper IEP Team is constituted, we emphasize the importance of ensuring that individualized determinations are made as to the types and amounts of special education and related services to be provided to each child with a disability. In that regard, a State may not have a rule or policy that would restrict or limit the amount of services to be provided to children with disabilities who, because of serious health problems, must receive required special education services in a nursing home. Rather, under IDEA, the amount and types of special education and related services provided to a child must be based on the child's individual needs as set forth in the child's IEP. IDEA's definition of related services includes an array of support services that are provided if they are required to assist a child with a disability to benefit from special education. Among these are school health services and school nurse services. 34 CFR §300.34(c)(13). For example, these services could include the provision of a nurse to assist a ventilator dependent child in a school setting.[10]

The following best practices could assist in the implementation of these important IDEA requirements. If a child is unavailable for medical reasons during a portion of the school day, the IEP Team should discuss the time or times when services should be provided to the child. Or, for

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[9] IEP requirements are at 34 CFR §§300.320-300.324.

[10] *See* Cedar Rapids Community School District v. Garret F, 526 U.S. 66 (1999).

example, if a child is only able to participate in instruction for short periods of time, the IEP Team should discuss the best methods to provide the required special education and related services to the child.

Provision of Special Education and Related Services in the Least Restrictive Environment (LRE)

The requirements for determining the educational placement of a child with a disability, which are included in the Part B regulations at 34 CFR §§300.114 through 300.118, are fully applicable to the education of children with disabilities residing in nursing homes. These regulations provide that to the maximum extent appropriate, children with disabilities are to be educated with children who are not disabled and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The child's placement must be determined at least annually and be made by a group of persons that includes the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. Placement decisions must be made by this group of knowledgeable persons on an individual basis in light of the child's unique needs, and, unless the IEP requires a different arrangement, the child must be educated in the school he or she would attend if not disabled. We understand that children residing in nursing homes may not be able to attend the school they would attend if not placed in the nursing home. However, in these situations, the public agency still must ensure that children with disabilities residing in nursing homes are educated in the least restrictive environment appropriate to the child's needs, based on his or her IEP.[11]

As a best practice, we note that because school-age children living in nursing homes are often medically fragile,[12] it may be appropriate for the child's physician or other knowledgeable nursing home staff familiar with the child to be included as a member of the placement team. This team member can assist in making the determination as to whether the child is too fragile to attend a local school, and could also provide input regarding other factors that may impact placement decisions, such as the child's tolerance for being on a bus and sitting for extended periods of time.

In instances where the placement team determines the child's LRE is instruction in the nursing home, the public agency must ensure that the child receives all of the special education and related services included in his or her IEP in the nursing home. If a child is able to move

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[11] *See* OSEP Letter to Anderson (November 30, 2012) OSEP Letter to Hungate (January 5, 2011), and OSEP Memorandum 05-08 (addressing placement requirements for children with disabilities in various residential facilities).

[12] Nearly 71 percent of children residing in nursing homes have at least two active disease diagnoses, according to analysis of CMS data. *See* United States Government Accountability Office's *Special Education – Additional Federal Actions Could Help Address Unique Challenges of Educating Children in Nursing Homes*, July 2014 available at: http://www.gao.gov/products/GAO-14-585.

throughout the nursing home, it may be possible for instruction to take place in a classroom in the nursing home. However, when a child is too fragile to be moved or if the child is prone to infections and must be isolated, the public agency may choose to provide one-on-one services in the child's room.

The IEP Team must review each child's IEP periodically, but not less than annually to determine whether the annual goals are being achieved, and revise the child's IEP, as appropriate, to address, among other matters, any lack of expected progress toward the child's annual goals, and in the general education curriculum, if appropriate. 34 CFR §300.324(b)(1)(i)-(ii). Similarly, the child's placement must be determined at least annually and must be based on the child's IEP. 34 CFR §300.116(b)(1)-(2). If a child's condition changes after the annual IEP Team meeting, it would be appropriate for the IEP Team to consider whether revisions to the child's IEP are necessary. Because the child's placement is based on the child's IEP, if the IEP is changed, the placement team may need to determine whether the child's LRE has changed, and if so, may need to make conforming changes to the child's placement. 34 CFR §300.116(a)(2). For example, if a child's condition stabilizes or improves and the child's doctor believes the child can tolerate additional instruction or be transported to a local school for instruction, the child's IEP Team may need to revise the child's IEP to determine if additional services are warranted and the placement team may need to consider whether the nursing home continues to be the least restrictive setting where the child should receive FAPE.

Dispute Resolution Options

It is important to note that parents of children residing in nursing homes are afforded the same procedural safeguards and due process rights as all other parents of children with disabilities. 34 CFR §§300.500 through 300.536. Therefore, if a parent of a child residing in a nursing home disagrees with the public agency responsible for providing FAPE on any matter regarding the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, the parent may request mediation under 34 CFR §300.506, file a due process complaint under 34 CFR §300.507 to request a due process hearing, or file a State complaint under 34 CFR §300.153.

Qualifications of Personnel Providing Special Education and Related Services to Children Residing in Nursing Homes

Ensuring that personnel serving children with disabilities residing in nursing homes have the requisite qualifications is paramount. To this end, IDEA and its implementing regulations require a State to establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of Part B of IDEA are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. 34 CFR §300.156(a) and 300.201; see also 34 CFR §300.207. Therefore, States must ensure that they establish and maintain qualifications to ensure that personnel serving children with disabilities

residing in nursing homes are appropriately and adequately prepared and trained, and possess the content knowledge and skills necessary to serve this unique population of children with disabilities.

Possible Funding Sources

We recognize that serving children with disabilities residing in nursing homes may present unique challenges and may require some school districts to be responsible for a particularly large share of high-cost services because of the large concentrations of children with high needs in those districts. There are several ways that States can assist these school districts. Each fiscal year States may reserve a portion of their IDEA Part B funds for authorized State-level activities, other than administration. 34 CFR §300.704(b)(4). These State-level funds may be used for activities such as support and direct services, including technical assistance, personnel preparation and professional development and training, and to assist LEAs in meeting personnel shortages. 34 CFR §300.704(b)(4)(i) and (vii).

To assist school districts in serving high need children with disabilities, each State has the option of establishing an LEA high cost fund and to reserve for each fiscal year 10 percent of the amount the State reserves for other State-level activities to finance and make disbursements from that fund to its LEAs. The definition of a high need child with a disability is included in the State plan for the high cost fund and must at a minimum address the financial impact a high need child with a disability has on the budget of the child's LEA and ensures that the cost of the high need child with a disability is greater than three times the average per pupil expenditure in that State. The costs associated with educating a high need child with a disability are only those costs associated with providing direct special education and related services to the child that are identified in the child's IEP. Therefore, in order for a public agency to be eligible for a disbursement from the State's high cost fund, (if the State has a high cost fund), the child must meet the State definition of high need child with a disability, and the LEA must meet the requirements included in the State's high cost plan.

Additional Resources

The Office of Special Education Programs (OSEP) funds a large network of technical assistance centers that develop materials and resources to support States, school districts, schools, and teachers to improve the provision of services to children with disabilities. The U.S. Department of Education does not mandate the use of, or endorse the content of, these products, services, materials, and/or resources; however, States and LEAs may wish to seek assistance from some of the OSEP-funded technical assistance centers available at: http://ccrs.osepideasthatwork.org and http://www.tadnet.org/pages/526-find-a-center.

We encourage States and LEAs to review their policies and procedures to ensure that children with disabilities residing in nursing homes are timely identified and evaluated, and provided with

the special education and related services necessary for them to receive FAPE. We ask you to share this information with your local school districts and other public agencies to help ensure all children with disabilities, including children residing in nursing homes, receive a high-quality education. I hope this guidance is helpful to both public agencies and parents. If you have additional questions, please contact Jessica Spataro at Jessica.Spataro@ed.gov. Thank you for your continued interest in improving results for children with disabilities.

Sincerely,

Michael K. Yudin
Assistant Secretary

Ruth E. Ryder
Acting Director
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